

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

7 GLORIA SCOTT AND *
8 DEANIA JACKSON, *
9 * NO. 96-8461
10 VERSUS * DIVISION "I"
11 * SECTION 14
12 THE AMERICAN TOBACCO *
13 COMPANY, INC., ET AL. *

17 Transcript of proceedings before the
18 Honorable Richard J. Ganucheau, Judge Pro Tempore,
19 Civil District Court, Parish of Orleans, State of
20 Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
21 70112, commencing on June 18, 2001.

27 * * * * *
28 Monday Morning Session
29 May 12, 2003
30 9:40 a.m.
31 * * * * *

I N D E X

2 Witness Page
3 ROBIN DALE KINSER
Deposition by reading 20537
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5 PHIL FISHER
Deposition by videotape 20561
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Monday Morning Session
May 12, 2003
9:40 a.m.

* * * * *

P R O C E E D I N G S

* * * * *

(In open court without a jury
present:)

THE COURT:

Good morning.

On Wednesday -- or Thursday, rather,
of last week, in the afternoon session,
there was a motion made by Mr. Sholes for
a mistrial that appears at transcript page
at 20400 at lines 15 through 25.

I have received a memorandum in
support of the motion for a mistrial over

18 the signature of Mr. Richardson and other
19 defense counsel named.

20 Mr. Richardson, good morning.

21 MR. RICHARDSON:

22 Good morning.

23 THE COURT:

24 Has a pleading been filed entitled
25 Motion for Mistrial?

26 MR. RICHARDSON:

27 No, Your Honor. That was simply our
28 bench brief in support of the oral
29 motion.

30 Did Your Honor believe we should also
31 file an actual motion? Because I could do
32 that, if you like.

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1 THE COURT:

2 It's your motion, counsel.

3 MR. RICHARDSON:

4 I believe that the oral motion that
5 Mr. Sholes made is our motion for
6 mistrial. That's the memorandum in
7 support of it per the Court's direction on
8 Thursday afternoon.

9 THE COURT:

10 And I indicated that I would hear the
11 argument on the motion and the opposition
12 this morning.

13 Are defendants ready to proceed to
14 argue in support of that motion?

15 MR. WITTMANN:

16 Yes, we are, Your Honor.

17 THE COURT:

18 Are plaintiff counsel ready to
19 respond?

20 MR. MURRAY:

21 Yes, Your Honor.

22 THE COURT:

23 All right. I will hear the arguments
24 in support of the motion.

25 MR. WITTMANN:

26 Thank you, Your Honor.

27 Judge, this is a case in which
28 sympathy and prejudice have always been a
29 concern for the defendants.

30 On one side we have a class of people
31 who claim they just want some medical
32 tests and a chance to break the chains of

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1 addiction.

2 On the other side, we have big
3 tobacco, the pejorative term that is most
4 frequently invoked by plaintiffs counsel.

5 The potential for sympathy and
6 prejudice in this case is truly enormous,
7 and the plaintiffs have done everything in
8 their power to exploit that potential.

9 They have accused the chief executive
10 officers of the tobacco companies of lying
11 to the public.

12 They have suggested to the jury that
13 one of the defense experts, Dr. Viscusi,
14 thought they were ignorant and not able to

15 understand the issues in this case.

16 They have repeatedly suggested to the
17 jury that the defendants are responsible
18 for killing hundreds of thousands of
19 Americans in a callous and deliberate
20 fashion.

21 The defendants from the outset have
22 struggled to prevent sympathy and
23 prejudice from clouding the issues in this
24 case.

25 Over a year ago we filed a motion to
26 exclude all evidence concerning personal
27 opinions of counsel from the case, and
28 plaintiffs counsel stipulated that they
29 would not comment on, quote, the
30 credibility of any defendant or their own
31 personal experiences or opinions, closed
32 quote.

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1 The Court granted our motion, and
2 plaintiffs counsel were well aware of what
3 Your Honor expected of them during the
4 course of this trial.

5 They even told Your Honor they didn't
6 need to be told what to do and not do in
7 conducting the issues in this trial,
8 presenting the evidence to the jury; that
9 they were all experienced trial lawyers
10 and knew what they were doing.

11 And I submit that's actually correct,
12 Judge. I agree with them.

13 Yet during the course of this trial,
14 plaintiffs counsel have repeatedly
15 disregarded their stipulation and ignored
16 Your Honor's order.

17 Throughout February --

18 THE COURT:

19 Mr. Wittmann, let me indicate to you
20 what I am interested in. I'm interested
21 in the events of Thursday afternoon which
22 gave rise to Mr. Sholes' motion for
23 mistrial at page 20400 of the record.
24 That's what I'm hearing.

25 I know the history. I know the
26 acrimony and the motions that have been
27 flying both ways in this case.

28 But what you are talking about now
29 has no bearing on what I have to decide
30 today. I am going to decide today whether
31 to grant or deny Mr. Sholes' motion for a
32 mistrial based on the questions asked by

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1 Mr. Bencomo of the witness on Thursday
2 afternoon.

3 MR. WITTMANN:

4 I appreciate that, Your Honor. I
5 apologize for going on too long with the
6 background, but I thought some was
7 necessary.

8 THE COURT:

9 By the way, I read your memorandum.

10 MR. WITTMANN:

11 Thank you, Judge.

12 Just last week Mr. -- to bring it
13 up-to-date, Your Honor warned, and I
14 quote, that mistrial is concomitant with
15 cumulative stuff.

16 That warning was issued on Wednesday,
17 May 7th, and Your Honor's warning was
18 ignored.

19 The very next day, Thursday, May 8th,
20 plaintiffs counsel made remarks that were
21 loud enough to be heard by the jury during
22 Dr. Townsend's testimony, and engaged in
23 the gestures and the head-shaking for
24 which they had already been admonished by
25 the Court, and the Court reemphasized its
26 earlier warnings just before lunch.

27 And I think what Your Honor actually
28 said at that time is important, Judge.
29 You said, and I quote:

30 Everybody in this courtroom is aware
31 of the evidence. Body language is not
32 allowable, gestures and facial gestures

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1 and other antics such as laughter and
2 smirking is not allowed, and if I see it
3 done, I'm going to impose some penalties.

4 And it's a terrible word, but
5 mistrial is not out of the question if it
6 continues. And I recognize what a blow
7 that would be to both sides, but I'm here
8 to give a fair trial. And if it continues
9 and it's blatant and I think it gets to
10 that point, I won't hesitate. Closed
11 quote.

12 It's hard for me to imagine a
13 stronger warning than the warning you gave
14 last Thursday. But your warning was
15 ignored almost immediately.

16 Just after lunch, plaintiffs counsel
17 flagrantly violated Your Honor's order
18 with the following series of questions to
19 Dr. Townsend.

20 Question: You are aware, are you
21 not, of the CDC's statistics that show
22 that four hundred thousand -- four hundred
23 thousand Americans die each year as a
24 result of cigarette smoking; is that not
25 correct, sir?

26 Answer: I have seen some various
27 statistics. That's one of them.

28 Question: And you have seen
29 statistics, have you not, that the CDC,
30 the Centers for Disease Control, shows
31 also that over ten thousand of our
32 citizens here in Louisiana die as a result

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1 of smoking products such as yours and
2 those of the defendants; is that not
3 correct, sir?

4 Answer: I don't know that.

5 Question: You don't know how many
6 people your company has killed in
7 Louisiana; is that correct?

8 The objection was sustained.

9 Question: Sir, did you ever meet my
10 father?

11 Now, with this line of questioning,
12 Judge, plaintiffs counsel not only accused
13 R. J. Reynolds of killing people in
14 Louisiana, a clear violation of the
15 stipulation of the order prohibiting
16 comments on culpability, but he injected
17 his own personal experiences into the case
18 by leading the jury to believe that R. J.
19 Reynolds also killed his father.

20 I respectfully submit to the Court
21 that plaintiffs counsel has engaged in
22 prejudicial misconduct. It can't be cured
23 by any instruction.

24 In the eyes of this jury, my client
25 is now a killer of ten thousand Louisiana
26 citizens every year, according to
27 plaintiffs counsel, including
28 Mr. Bencomo's father.

29 Plaintiffs counsel are well aware
30 that one juror's father or former smoker
31 died of cancer, as did the mother of
32 another juror.

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1 Plaintiffs counsel questioned some of
2 these jurors in voir dire. There can be
3 no doubt that his questions were an
4 attempt to evoke the sympathy and emotions
5 of these jurors and cause them to think of
6 their personal loss rather than the issues
7 in this case.

8 Now, throughout the case, Judge,
9 plaintiffs counsel have gone to great
10 pains to paint big tobacco as the Evil
11 Empire. They have apparently felt that,
12 despite Your Honor's warnings, they can
13 say whatever they want about big tobacco
14 and get away with it.

15 And although the Court has prohibited
16 any evidence regarding the cause of
17 Ms. Scott's lung cancer or her prognosis
18 because of its prejudicial impact, we now
19 have Mr. Bencomo's father injected into
20 this case as a victim.

21 It's truly a disaster for this case
22 to end in a mistrial, but Your Honor did
23 your best to stop it, the defendants did
24 their best to stop it, and the plaintiffs
25 owe only themselves to blame.

26 Their arrogance, their disregard of
27 our stipulation, and their contempt of
28 Your Honor's orders got us here. And I
29 urge you to do what a trial judge must do
30 in this situation, which is to declare a
31 mistrial.

32 The plaintiffs have poisoned the well

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1 in this case by their conduct, by their
2 efforts to inflame the jury in a case in
3 which personal injury and wrongful death
4 are not even an issue.

5 They are seeking medical testing for

6 people with no symptoms of disease, but
7 their focus has portrayed the defendants
8 as killers who have even had a hand in
9 killing the parent of one of the
10 plaintiffs lawyers.

11 As Mr. Sholes urged last week, Your
12 Honor, somebody has got to stop them.
13 Unfortunately they weren't stopped before,
14 and now it's too late. And the defendants
15 respectfully move, Your Honor, for a
16 mistrial in in this case.

17 THE COURT:

18 Do you wish to put any evidence into
19 the record in support of your motion on
20 behalf of defense counsel, Mr. Wittmann?

21 MR. WITTMANN:

22 Your Honor, I know of no evidence
23 that we could introduce into the record
24 other than what's happened frankly. So,
25 no, the answer to the question is no.

26 THE COURT:

27 All right. Any other argument in
28 support of the motion?

29 Response?

30 MR. MURRAY:

31 Good morning, Your Honor. Stephen
32 Murray for the plaintiffs' legal

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1 committee.

2 Your Honor, I'm certainly not here to
3 argue the propriety of the question that
4 was asked. The question was asked, there
5 was an objection made, and Your Honor
6 ruled.

7 But within the context of the motion
8 for a mistrial, I think it is fair to put
9 the question into some perspective.

10 Your Honor, it was counsel for RJR
11 that put the skunk in the jury box, to
12 borrow a term from Mr. Belasic. In
13 opening statement, Mr. Wittmann told the
14 jury that the reason we are here is
15 because of plaintiffs' counsel desire to
16 make a lot of money on this case, or words
17 to that effect.

18 It was a question -- it was a
19 statement to the jury that was certainly
20 outside the record of any proof that would
21 be offered in this case. It was a
22 statement made to prejudice the jury
23 against plaintiffs counsel and to make
24 this case into a case of greed rather than
25 a case to be decided on the issues.

26 Your Honor, when counsel goes outside
27 the record to make that suggestion to the
28 jury, there is no way for us to respond
29 within the record. But it is important,
30 we believe, that the jury --

31 THE COURT:

32 Tell me what you meant by that last

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1 statement, when counsel goes outside the
2 record?

3 MR. MURRAY:

4 Your Honor, counsel attempted to
5 influence the jury by making a statement
6 that would not be supported by evidence
7 introduced in the case, that could not be
8 responded to by evidence within the case,
9 and could only be responded to in a
10 rhetorical fashion.

11 Whether that's proper or improper is
12 for Your Honor to decide.

13 THE COURT:

14 You are speaking of Mr. Bencomo's
15 last question that prompted the motion for
16 a mistrial?

17 MR. MURRAY:

18 Yes, Your Honor.

19 Your Honor, the purpose of the
20 question was not to influence the jury
21 with respect to sympathy, but rather to
22 respond to the suggestion that we are
23 here -- we, plaintiff counsel, are here
24 out of greed, and to suggest that there
25 are other reasons why we may be here.

26 And there are other reasons why we
27 are here, Judge, for each and every one of
28 us.

29 I mean, when I got involved in
30 tobacco litigation in 1992, no plaintiff
31 lawyer had ever gotten a nickel out of the
32 tobacco industry. When the Scott case was
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1 filed, no plaintiff lawyer had ever
2 received a nickel from the tobacco
3 industry.

4 Many of us, Judge, were motivated not
5 by a desire to make money, but to hold
6 accountable an industry that had skated
7 and had had no responsibility for an
8 intolerable situation.

9 That's why we are here, and I think
10 it's fair for us to make that point to the
11 jury by a rhetorical question.

12 This was not the first rhetorical
13 question asked in this case by either
14 side.

15 Your Honor, this is a lengthy trial.
16 With respect to the prior motions of
17 defense counsel that Mr. Wittmann suggests
18 should somehow cumulatively bring about a
19 mistrial, none of those were supported by
20 the record. They were simply allegations,
21 charges made by defense counsel trying to
22 provoke a mistrial.

23 We contested each of those
24 accusations. We don't believe that our
25 conduct has been outside of what's to be
26 expected of responsible and professional
27 counsel.

28 But Your Honor, we are human. When
29 we hear a ludicrous statement from a
30 witness on the stand, sometimes it's
31 difficult not to have -- difficult not to
32 have at least some response, as much as we

1 might want to guard against it.

2 Your Honor, this motion for mistrial
3 would not be, as Mr. Wittmann suggests, a
4 disaster for both sides. It would benefit
5 and profit only the defendants.

6 This is an unusual case, Your Honor.
7 Protracted litigation has an equalizer in
8 most cases, and that's prejudgment
9 interest, so the delays tend to be evened
10 out by that factor.

11 But in this case, Your Honor, since
12 the relief we seek is injunctive, there is
13 not likely to be prejudgment interest, and
14 in fact, Your Honor, the class is
15 shrinking every day. Delay benefits
16 nobody but the defendants.

17 And the other thing I would like to
18 remind Your Honor of is that Mr. Bencomo's
19 intent to respond to Mr. Wittmann's
20 characterization of our motivation was
21 made clear to the Court during the
22 questioning of Mr. Townsend on his
23 qualifications, and the response of
24 defense counsel and the response of the
25 Court was, well, but that's not an issue
26 for qualifications.

27 So Mr. Bencomo withdrew the question,
28 but indicated his intent to follow up on
29 it in cross-examination.

30 Now, Your Honor, he made the attempt,
31 Your Honor ruled, and the -- the
32 defendants objected and Your Honor ruled.

1 But let me talk about prejudice for a
2 minute, Your Honor, because what the
3 defendants seek is a drastic remedy. They
4 seek to disrail a trial that has been very
5 protracted, very expensive for both sides,
6 and required a tremendous investment of
7 Court resources and imposition on the
8 resources of the entire judicial system.

9 What's the prejudice, Your Honor?

10 The prejudice is that somehow Mr. Bencomo
11 has communicated a message to the jury
12 that he lost a loved one to tobacco.

13 Your Honor, the jury knows that four
14 hundred thousand people a year die from
15 the use of cigarettes. That's really not
16 in dispute. They know that tens of
17 thousands of Louisiana citizens get sick
18 and die on an annual basis. That's not in
19 dispute.

20 Many of them have lost -- some of
21 them have lost loved one. They listened
22 to other jurors through the voir dire
23 process describe their loss of loved
24 ones.

25 Where is the prejudice? What
26 information did Mr. Bencomo impart to this
27 jury that they weren't already well aware
28 of? The drastic remedy that they seek is
29 not warranted.

30 Finally, Your Honor, for us to use
31 the term kill to describe what cigarettes
32 do to the consumers who use them and to

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1 describe the risk at which those consumers
2 are put for which we seek medical
3 monitoring and cessation benefits is a
4 fair comment on the evidence, and we make
5 no apology for the use of that term.

6 If the Court tells us don't use it,
7 we won't. But we think it's very well
8 supported by the evidence in this case.

9 There is no significant prejudice to
10 the defendants. The motion for mistrial
11 should be denied.

12 THE COURT:

13 Rebuttal?

14 MR. MURRAY:

15 Excuse me, would Your Honor indulge
16 me?

17 Your Honor, just this last point. If
18 the personalization of this issue has been
19 created by a question that went unanswered
20 and to which Your Honor immediately
21 sustained an objection, then we would
22 suggest that the more appropriate remedy
23 to a mistrial would be to instruct the
24 jury that they should disregard whatever
25 we said.

26 THE COURT:

27 Well, what are you suggesting? That
28 I read the question back and tell them
29 that the objection was sustained, and ring
30 the bell again?

31 MR. MURRAY:

32 Your Honor --

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1 THE COURT:

2 I hope not. It seems like --

3 MR. MURRAY:

4 I wouldn't recommend that. I'm just
5 saying that it is as an alternative. If
6 the defendants feel somehow that they have
7 been prejudiced to say that bell can't be
8 unrung, then I think that's the preferable
9 remedy than to declare a mistrial after 18
10 weeks of trial.

11 Your Honor, lawyers in lawsuits make
12 judgments on behalf of their advocacy, and
13 if every time one of us makes a judgment
14 it disrains a trial, we would never
15 complete difficult trials.

16 That's why the law is so clear that
17 mistrial is the remedy of last resort only
18 for the most extreme cases and only where
19 the prejudice is so great that it's the
20 only possible way to deal with the
21 difficulty.

22 Here I suggest there is no prejudice
23 because the jury well knows all of the
24 facts that were implied, although not
25 stated, by that question.

26 MR. WITTMANN:

27 Your Honor, may I have a brief
28 rebuttal?
29 MR. RUSS HERMAN:
30 Excuse me just one second. Excuse
31 me, Mr. Wittmann.
32 MR. MURRAY:

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1 Thank you, Your Honor.
2 MR. WITTMANN:
3 Your Honor, as I appreciate
4 Mr. Murray's argument, he's not quibbling
5 with us about the merits of the question
6 that was asked, he says that plaintiffs
7 counsel was asking a rhetorical question.
8 I submit to the Court that was not a
9 rhetorical question. It was a question
10 designed to elicit a fact.
11 So as I appreciate his argument, what
12 they are now saying about the plaintiffs'
13 lawyers not being motivated to make money
14 and so forth, it seems to me his argument
15 is that they are saying that those
16 questions were intentioned, in fact,
17 counsel wanted the jury to believe that
18 Mr. Bencomo's father was killed by R. J.
19 Reynolds Tobacco Company, and they wanted
20 them to know that the lawyers are here to
21 vindicate Mr. Bencomo's father.
22 That is totally improper, and now we
23 know that it was both outside of the
24 record and intentional.
25 All I said in my opening statement is
26 that this case is about money, and it is
27 the plaintiffs who want us to pay for
28 smoking cessation and monitoring for a
29 million plus people.
30 What the plaintiffs did here is to
31 intentionally tell the jury a fact outside
32 of the evidence, and did it in a way

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1 designed to elicit extreme prejudice
2 against the defendants. It's part of the
3 pattern we have been fighting, Your Honor,
4 ever since this case started.
5 Your Honor warned just last just week
6 that the consequences of this continued
7 effort by the plaintiffs could result in a
8 mistrial, and you called it yourself, and
9 they ignored your warning.
10 We submit the remedy we seek is
11 right.
12 THE COURT:
13 The cases hold -- and I am referring
14 to a specific case called Searle,
15 S-e-a-r-l-e, versus Travelers, 557
16 Southern 2d 321, 557 Southern 2d 321, that
17 motion for mistrial should be granted when
18 I am convinced that prejudicial misconduct
19 occurred during the trial which cannot be
20 cured by an admonition or instruction to
21 the jury.
22 I am also required by that -- by the
23 suggested procedure set out in this case

24 that I need to state on the record my
25 findings of fact and conclusions of law in
26 ruling on the motion for a mistrial.

27 I don't know of any way that I can do
28 that with any credibility without
29 questioning these jurors.

30 It's my intention to question these
31 jurors individually in the presence of
32 counsel on the record.

20507

1 And the only person who can talk
2 during that session will be myself and the
3 juror, and I am going to ask the question
4 of the juror whether anything occurred on
5 last Thursday during the cross-examination
6 of Dr. Townsend that has affected their
7 ability to be a fair and impartial juror
8 in the case.

9 That's the only way I can determine
10 that nothing has occurred in the case that
11 has destroyed the ability of these jurors
12 to be fair and impartial in the case.

13 If the answer is negative, that ends
14 the inquiry. And if the answer is
15 positive, I may ask for an explanation.

16 And we are going to commence that in
17 just a few minutes, as soon as I find some
18 space in which to do that. I'm not sure
19 whether we are going to do it in the
20 courtroom or in the Judge's chambers.

21 But we are going to recess until
22 10:15 by that wall clock and I will make
23 the decision.

24 Anything for the record as a result
25 of what I just said?

26 MR. MURRAY:

27 No, Your Honor.

28 MR. WITTMANN:

29 Nothing, Your Honor.

30 THE COURT:

31 Okay.

32 (A recess is taken at 10:07 a.m.)

20508

1 (In open court without a jury present
2 at 10:16 a.m.):

3 THE COURT:

4 As I told counsel in chambers, the
5 procedure is going to be as follows.

6 I am going to summon each juror into
7 the courtroom one at a time out of the
8 presence of the other jurors. I will
9 convert this courtroom to my chambers.

10 Plaintiffs will be allowed to have
11 two trial counsel in the courtroom during
12 this procedure. Each defendant will be
13 allowed to have one trial counsel in the
14 courtroom during this procedure.

15 I am going to question the jurors
16 with regard to their ability to be fair
17 and impartial in this case individually.
18 After that, I will take a short recess.

19 Once I reach my decision on the
20 motion, we will reconvene. I will

21 announce my decision, and we will proceed
22 accordingly.
23 Any questions?
24 MR. WITTMANN:
25 No, Your Honor.
26 MR. RUSS HERMAN:
27 No, Your Honor.
28 THE COURT:
29 All right. Let's clear the
30 courtroom. Let's have two counsel for
31 plaintiffs side and one counsel for each
32 defendant in the case.

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1 MR. RUSS HERMAN:
2 Do we have a minute for a bathroom
3 break quickly?
4 THE COURT:
5 You have got a minute.
6 -- -- --
7 (In the courtroom as in chambers with
8 Counsel Murray, Herman, Wittmann, Long,
9 Gay and Schneider present. Each juror is
10 called in separately.)
11 THE COURT:
12 Good morning, Mr. Forman.
13 JUROR FORMAN:
14 Good morning.
15 THE COURT:
16 I'm sure you remember when we were
17 selecting this jury our goal was to find
18 people who could be fair and impartial to
19 both sides in this case?
20 JUROR FORMAN:
21 Yes, sir.
22 THE COURT:
23 You remember that?
24 JUROR FORMAN:
25 I remember.
26 THE COURT:
27 With that in mind, I have a question
28 that I want to ask you and I want you to
29 answer it. You are under oath.
30 JUROR FORMAN:
31 Okay.
32 THE COURT:

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1 Did anything occur in this trial on
2 Thursday, May 8, which was last Thursday,
3 during the cross-examination of Dr. David
4 Townsend that has affected your ability to
5 be a fair and impartial juror in this
6 case?
7 JUROR FORMAN:
8 No.
9 THE COURT:
10 Yes or no, if you are able to?
11 JUROR FORMAN:
12 No, huh-uh.
13 THE COURT:
14 No?
15 JUROR FORMAN:
16 No.
17 THE COURT:

18 Thank you very much. Go back to the
19 jury lounge. We will call you when we are
20 ready to begin. Thank you.
21 Good morning, Ms. Beo.
22 JUROR BEO:
23 Good morning.
24 THE COURT:
25 How are you today?
26 JUROR BEO:
27 I'm fine.
28 THE COURT:
29 I'm sure you remember when we were
30 selecting the jurors, our goal was to find
31 people who could serve as jurors in this
32 case who could be fair and impartial to

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1 both sides. Do you remember that?
2 JUROR BEO:
3 Yes.
4 THE COURT:
5 With regard to that, I have a
6 question to ask you. Did anything occur
7 in this trial on Thursday, May 8, that was
8 last Thursday, during the cross-
9 examination of Dr. David Townsend that has
10 affected your ability to be fair and
11 impartial as a juror in this case?
12 JUROR BEO:
13 I can't think of anything that would
14 have affected my judgment, no.
15 THE COURT:
16 Your ability to be fair and
17 impartial?
18 JUROR BEO:
19 No.
20 THE COURT:
21 Okay. Thank you. Go on back to the
22 jury room. We will call you when we are
23 ready to begin.
24 JUROR BEO:
25 Okay.
26 THE COURT:
27 Thank you.
28 THE CLERK:
29 Mr. Bax.
30 THE COURT:
31 In the chair of honor, Mr. Bax, good
32 morning.

20512

1 JUROR BAX:
2 Good morning.
3 THE COURT:
4 When we were selecting jurors in this
5 case, I'm sure you will remember it was
6 our goal to select jurors who could be
7 fair and impartial to both sides in this
8 case. Do you remember that?
9 JUROR BAX:
10 Right.
11 THE COURT:
12 With that in mind, I have a question
13 to ask you. I would like you to answer
14 yes or no if you are able to. Did

15 anything occur in this trial on Thursday,
16 May 8th, which was last Thursday, during
17 the cross-examination of Dr. David
18 Townsend that has affected your ability to
19 be a fair and impartial juror in this
20 case?

21 JUROR BAX:

22 No.

23 THE COURT:

24 Thank you. Back to the jury room.

25 We will call you when we are ready to
26 start.

27 JUROR BAX:

28 All right.

29 THE CLERK:

30 Ms. Wright.

31 THE COURT:

32 Good morning.

20513

1 JUROR WRIGHT:

2 Good morning.

3 THE COURT:

4 Glad you are here.

5 I have a question I want to ask you,
6 but I want to remind you of something
7 before I do that.

8 Do you remember when we were picking
9 the jurors in the case, it was our goal to
10 pick people as jurors who could be fair
11 and impartial to both sides. Do you
12 remember that?

13 JUROR WRIGHT:

14 Uh-huh.

15 THE COURT:

16 With that in mind I want to ask you
17 this question. Did anything occur in this
18 trial on Thursday, May 8, which was last
19 Thursday, during the cross-examination of
20 Dr. David Townsend that has affected your
21 ability to be a fair and impartial juror
22 in this case?

23 JUROR WRIGHT:

24 No, it hasn't.

25 THE COURT:

26 Thank you. Go back to the jury
27 lounge. We will call you when we are
28 ready to start.

29 JUROR WRIGHT:

30 Okay.

31 THE CLERK:

32 Ms. Thomas.

20514

1 THE COURT:

2 Good morning.

3 JUROR M. THOMAS:

4 Good morning.

5 THE COURT:

6 I'm sure you remember when we were
7 picking jurors for this trial, it was our
8 goal to pick people as jurors who could be
9 fair and impartial to both sides in the
10 case. Do you remember that?

11 JUROR M. THOMAS:

12 Yes.
13 THE COURT:
14 With that in mind, I want to ask you
15 a question. And answer with a yes or no
16 if you can. Did anything occur in this
17 trial on Thursday, May 8, which is last
18 Thursday, during the cross-examination of
19 Dr. David Townsend that has affected your
20 ability to be a fair and impartial juror
21 in this case?
22 JUROR M. THOMAS:
23 No.
24 THE COURT:
25 Thank you. Back to the jury lounge.
26 We will call you when we are ready to
27 start.
28 JUROR M. THOMAS:
29 Okay.
30 THE CLERK:
31 Ms. Janes.
32 THE COURT:

20515

1 Good morning.
2 JUROR JANES:
3 Good morning.
4 THE COURT:
5 I'm going to ask you a question which
6 I would like you to answer with a yes or
7 no after I tell you this.
8 You remember I'm sure when we were
9 picking the jurors for this trial, it was
10 our goal to pick people as jurors who
11 could be fair and impartial to both sides
12 in this case. Do you remember that?
13 JUROR JANES:
14 Yes.
15 THE COURT:
16 And with that in mind, I want to ask
17 you a question, and answer it yes or no
18 for me, please. Did anything occur in
19 this trial on Thursday, May 8, which was
20 last Thursday, during the cross-
21 examination of Dr. David Townsend that has
22 affected your ability to be a fair and
23 impartial juror in this case?
24 JUROR JANES:
25 No.
26 THE COURT:
27 Thank you. Go back to the jury
28 lounge and we will call you when we are
29 ready to start.
30 THE CLERK:
31 Ms. Monroe.
32 THE COURT:

20516

1 Good morning, Ms. Monroe.
2 JUROR MONROE:
3 Good morning.
4 THE COURT:
5 Happy to have you here.
6 JUROR MONROE:
7 Happy to be here.
8 THE COURT:

9 Let me ask you a question after I
10 tell you this. And I would like you to
11 answer with a yes or no, please.
12 JUROR MONROE:
13 Okay.
14 THE COURT:
15 Do you remember when we were picking
16 jurors in this case, it was our goal to
17 pick people as jurors who could be fair
18 and impartial to both sides? Do you
19 remember that?
20 JUROR MONROE:
21 Yes.
22 THE COURT:
23 The question is did anything occur in
24 this trial on Thursday, May 8, which was
25 last Thursday, during the cross-
26 examination of Dr. David Townsend that has
27 affected your ability to be a fair and
28 impartial juror in this case?
29 JUROR MONROE:
30 No.
31 THE COURT:
32 Thank you. If you would go back to

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1 the jury lounge, we will call you when we
2 are ready to start.
3 JUROR MONROE:
4 Okay.
5 THE COURT:
6 Thank you.
7 THE CLERK:
8 Ms. Silverman.
9 THE COURT:
10 Good morning, Ms. Silverman.
11 JUROR SILVERMAN:
12 Good morning.
13 THE COURT:
14 I'm going to ask you a question which
15 I would like you to answer with a yes or a
16 no after I tell you this.
17 I'm sure you will remember that when
18 we were picking people for jury duty in
19 this case, it was our goal to pick people
20 who could be fair and impartial to both
21 sides in the case. Do you remember that?
22 JUROR SILVERMAN:
23 Right.
24 THE COURT:
25 Here is the question: Did anything
26 occur in this trial on Thursday, May 8th,
27 which was last Thursday, during the cross-
28 examination of Dr. David Townsend that has
29 affected your ability to be a fair and
30 impartial juror in this case?
31 JUROR SILVERMAN:
32 No.

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1 THE COURT:
2 Thank you. Go back to the jury
3 lounge and we will call you when we are
4 ready to start.
5 JUROR SILVERMAN:

6 Thank you.
7 THE CLERK:
8 Ms. Wilson.
9 THE COURT:
10 Good morning, Ms. Wilson.
11 JUROR WILSON:
12 Good morning.
13 THE COURT:
14 I'm going to ask you a question after
15 I tell you this, and I would like you to
16 answer the question with a yes or a no,
17 please.
18 JUROR WILSON:
19 Okay.
20 THE COURT:
21 You will remember I'm sure that when
22 we were picking people to be the jurors in
23 the case, we were looking for people who
24 could be fair and impartial to both sides
25 in the case. Do you remember that?
26 JUROR WILSON:
27 Yes.
28 THE COURT:
29 Here is the question: Did anything
30 occur in this trial on Thursday, May 8,
31 which was last Thursday, during the cross-
32 examination of Dr. David Townsend that has
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1 affected your ability to be a fair and
2 impartial juror in this case?
3 JUROR WILSON:
4 No.
5 THE COURT:
6 Thank you. Go back to the jury
7 meeting room and we will call you when we
8 are ready to start.

9 THE CLERK:
10 Mr. Reynolds.
11 THE COURT:
12 Good morning, Mr. Reynolds.
13 JUROR REYNOLDS:
14 Good morning. How are you doing?
15 THE COURT:
16 Fine, you how are you doing?
17 JUROR REYNOLDS:
18 I'm making it.
19 THE COURT:
20 Good.
21 I'm going to ask you a question in
22 just a second, but before I do that I am
23 going to tell you this, and I want you to
24 answer the question with a yes or no when
25 I ask it.
26 JUROR REYNOLDS:
27 Okay.
28 THE COURT:
29 You remember when we were picking
30 people to be jurors in the case, what we
31 were looking for were people who could be
32 fair and impartial to both sides in the
20520

1 case? Do you remember that?
2 JUROR REYNOLDS:

3 Yeah.
4 THE COURT:
5 Here is the question: Did anything
6 occur during this trial on Thursday, May
7 8, which was last Thursday, during the
8 cross-examination of Dr. David Townsend
9 that has affected your ability to be a
10 fair and impartial juror in this case?
11 JUROR REYNOLDS:
12 No.
13 THE COURT:
14 Thank you. If you would go back to
15 the jury lounge, we will call you when we
16 are ready to start.
17 JUROR REYNOLDS:
18 Okay.
19 THE CLERK:
20 Ms. Thomas.
21 THE COURT:
22 Good morning, Ms. Thomas.
23 JUROR D. THOMAS:
24 Good morning.
25 THE COURT:
26 I'm going to ask you a question in
27 just a minute or two, but I want to tell
28 you something first, and I would like you
29 to answer the question with a yes or no
30 when I ask it.
31 You remember, I'm sure, that when we
32 were picking people to serve on this jury,

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1 we were looking for people who could be
2 fair and impartial to both sides in the
3 case. Do you remember that?
4 JUROR D. THOMAS:
5 Yes.
6 THE COURT:
7 Here is the question: Did anything
8 occur during this trial on Thursday, May
9 8, that was last Thursday, during the
10 cross-examination of Dr. David Townsend
11 that has affected your ability to be a
12 fair and impartial juror in this case?
13 JUROR D. THOMAS:
14 No.
15 THE COURT:
16 Thank you. Go back to the jury
17 meeting room. We will call you when we
18 are ready to start.
19 THE CLERK:
20 Mr. Belsom.
21 THE COURT:
22 Good morning.
23 JUROR BELSOM:
24 Yes, sir.
25 THE COURT:
26 I'm going to ask you a question in
27 just a minute, but I want to tell you
28 something first, and I would like you to
29 answer the question with a yes or a no.
30 JUROR BELSOM:
31 Yes, sir.
32 THE COURT:

1 You will remember, I'm sure, when we
2 were picking people to be on this jury, we
3 were looking for people who could be fair
4 and impartial to both sides in the case.

5 Do you remember that?

6 JUROR BELSOM:

7 Yes, sir.

8 THE COURT:

9 The question is did anything occur in
10 this trial on Thursday, May 8, which was
11 last Thursday, during the cross-
12 examination of Dr. David Townsend that has
13 affected your ability to be a fair and
14 impartial juror in this case?

15 JUROR BELSOM:

16 No, sir.

17 THE COURT:

18 Thank you. If you would go back to
19 the jury meeting room, we will call you
20 when we are ready to start.

21 JUROR BELSOM:

22 Thank you.

23 THE CLERK:

24 Ms. Freemon.

25 THE COURT:

26 Come on up here, Ms. Freemon. Good
27 morning.

28 JUROR FREEMON:

29 Good morning.

30 THE COURT:

31 I am going to ask you a question in
32 just a minute, which I would like you to

1 answer with a yes or no.

2 Before I ask you that question, I
3 want to remind you of something. You will
4 recall, I'm sure, when we were picking
5 people to be on this jury, we were looking
6 for people who could be fair and impartial
7 to both sides in the case. Do you
8 remember that?

9 JUROR FREEMON:

10 Yes.

11 THE COURT:

12 The question I want to ask you is
13 this. Did anything occur in this trial on
14 Thursday, May 8, which was last Thursday,
15 during the cross-examination of Dr. David
16 Townsend that has affected your ability to
17 be a fair and impartial juror in this
18 case?

19 JUROR FREEMON:

20 No, it hasn't.

21 THE COURT:

22 Thank you. Go back to the jury
23 meeting room. We will call you when we
24 are ready to start.

25 THE CLERK:

26 Ms. Williams.

27 THE COURT:

28 Hi, Ms. Williams. Come on up here,
29 please.

30 Good morning.
31 JUROR E. WILLIAMS:
32 Good morning.

20524

1 THE COURT:

2 I am going to ask you a question I
3 would like you to answer with a yes or no,
4 but before I do that, I want to remind you
5 of the following.

6 I'm sure you will remember when we
7 were picking people to be jurors in the
8 case, we were looking for people who could
9 be fair and impartial to both sides in the
10 case. Do you remember that?

11 JUROR E. WILLIAMS:

12 Yes, sir.

13 THE COURT:

14 Here is the question. Did anything
15 occur in this trial on Thursday, May 8,
16 which was last Thursday, during the cross-
17 examination of Dr. David Townsend that has
18 affected your ability to be a fair and
19 impartial juror in this case?

20 JUROR E. WILLIAMS:

21 No, sir.

22 THE COURT:

23 Thank you. If you will go back to
24 the jury lounge, we will call you when we
25 are ready to start.

26 JUROR E. WILLIAMS:

27 Okay.

28 THE CLERK:

29 Ms. St. Cyr.

30 THE COURT:

31 Good morning, Ms. St. Cyr.

32 JUROR ST. CYR:

20525

1 Good morning, Judge.

2 THE COURT:

3 Have a seat, please.

4 I am going to ask you a question in
5 just a minute which I would like you to
6 answer with a yes or a no. But before I
7 ask you a question, I want to remind you
8 of this.

9 You will remember when we were
10 picking people to be on this jury, we were
11 looking for people who could be fair and
12 impartial to both sides in the case. Do
13 you remember that?

14 JUROR ST. CYR:

15 Yes, sir, I remember.

16 THE COURT:

17 Here is the question. Did anything
18 occur in this trial on Thursday, May 8,
19 which was last Thursday, during the cross-
20 examination of Dr. David Townsend that has
21 affected your ability to be a fair and
22 impartial juror in this case?

23 JUROR ST. CYR:

24 No.

25 THE COURT:

26 Thank you. If you would go back to

27 the jury meeting room, we will call you
28 when we are ready to start.

29 JUROR ST. CYR:

30 Okay.

31 THE CLERK:

32 Ms. Collins.

20526

1 THE COURT:

2 Good morning.

3 JUROR COLLINS:

4 Good morning.

5 THE COURT:

6 Have a seat.

7 I'm going to ask you a question in
8 just a minute for which I would like you
9 to answer with a yes or no. But before I
10 ask you the question, I want to remind you
11 of this.

12 You remember, I'm sure, that when we
13 were picking people to be jurors in the
14 case, we were looking for people who could
15 be fair to both sides and impartial as
16 jurors. Do you remember that?

17 JUROR COLLINS:

18 Yes.

19 THE COURT:

20 Here is the question: Did anything
21 occur in this trial on Thursday, May 8th,
22 which was last Thursday, during the cross-
23 examination of Dr. David Townsend that has
24 affected your ability to be a fair and
25 impartial juror in this case?

26 JUROR COLLINS:

27 No.

28 THE COURT:

29 Thank you. If you would go back to
30 the jury meeting room, we will call you
31 when we are ready to start.

32 THE CLERK:

20527

1 Ms. Williams.

2 THE COURT:

3 Come on up here, Ms. Williams,
4 please.

5 JUROR C. WILLIAMS:

6 Good morning.

7 THE COURT:

8 Good morning.

9 I'm going to ask you a question in a
10 minute to which I would like you to answer
11 with a yes or no.

12 But first I want to remind you that
13 you will remember when we were choosing
14 people to be jurors in the case, we wanted
15 people who could be fair and impartial to
16 both sides. Do you remember that?

17 JUROR C. WILLIAMS:

18 Yes.

19 THE COURT:

20 The question is did anything occur in
21 this trial on Thursday, May 8, which was
22 last Thursday, during the cross-
23 examination of Dr. David Townsend that has

24 affected your ability to be a fair and
25 impartial juror in this case?
26 JUROR C. WILLIAMS:
27 No.
28 THE COURT:
29 Thank you. If you would go back to
30 the jury meeting room, we will call you
31 when we are ready to start.
32 THE CLERK:

20528

1 Mr. Petri.
2 THE COURT:
3 Come up here, Mr. Petri. Good
4 morning.
5 JUROR PETRI:
6 Good morning, Your Honor.
7 THE COURT:
8 Have a seat.
9 I'm going to ask you a question which
10 I would like you to answer with a yes or a
11 no.
12 But before I do that, I want to
13 remind you that you remember when we were
14 picking people to be on this jury, we were
15 looking for people who could be fair and
16 impartial to both sides in the case. Do
17 you remember that?
18 JUROR PETRI:
19 Yes, sir.
20 THE COURT:
21 Here is the question. Did anything
22 occur during this trial on Thursday, May
23 8th, which was last Thursday, during the
24 cross-examination of Dr. David Townsend,
25 that has affected your ability to be a
26 fair and impartial juror in this case?
27 JUROR PETRI:
28 No, sir.
29 THE COURT:
30 Thank you. If you would go back to
31 the jury meeting room, we will call you
32 when we are ready to start.

20529

1 JUROR PETRI:
2 Thank you, sir.
3 THE CLERK:
4 Okay, Mr. Rose.
5 THE COURT:
6 Good morning.
7 JUROR ROSE:
8 Good morning. How are you doing?
9 THE COURT:
10 Fine.
11 JUROR ROSE:
12 Okay.
13 THE COURT:
14 I'm going to ask you a question in a
15 minute to which I would like you to answer
16 with a yes or a no.
17 Before I ask you the question, I want
18 to remind you of this. You remember when
19 we were picking people to be jurors in the
20 case, we were looking for people who could

21 be fair and impartial to both sides in the
22 case. Do you remember that?
23 JUROR ROSE:
24 Right.
25 THE COURT:
26 Here is the question. Did anything
27 occur in this trial on Thursday, May 8th,
28 which was last Thursday, during the cross-
29 examination of Dr. David Townsend that has
30 affected your ability to be a fair and
31 impartial juror in this case?
32 JUROR ROSE:

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1 No.
2 THE COURT:
3 Thank you. If you would go back to
4 the jury meeting room, we will call you
5 when we are ready to start.
6 JUROR ROSE:
7 Okay.
8 THE COURT:
9 Thank you.
10 JUROR ROSE:
11 You are welcome.
12 THE COURT:
13 The record should reflect that I have
14 questioned the twelve jurors and the seven
15 alternate jurors, and that each of them
16 responded negatively to the question I
17 posed to them.
18 As a result of this questioning by
19 the Court, anything for the record by
20 movers?
21 MR. WITTMANN:
22 No, Your Honor.
23 THE COURT:
24 Respondents, anything for the
25 record?
26 MR. MURRAY:
27 No, Your Honor.
28 THE COURT:
29 We will recess for five minutes, and
30 I will announce my decision on this motion
31 for mistrial.
32 MR. LONG:

20531

1 Your Honor, may we allow others back
2 in the courtroom now?
3 THE COURT:
4 Yes, I see no reason not to.
5 MR. LONG:
6 Okay. Thank you.
7 (A recess is taken at 10:47 a.m.)
8 -- -- --
9 (In open court without a jury present
10 at 10:55 a.m.:)
11 THE COURT:
12 As the record of my interrogation of
13 the jurors will reflect, nothing was
14 suggested during that questioning session
15 by any of the jurors that would form the
16 basis for my finding that misconduct has
17 occurred that has deprived or will deprive

18 the defendants in this case of the benefit
19 of a fair and impartial jury panel.

20 I find that whatever misconduct has
21 occurred as a result of the cross-
22 examination of Dr. David Townsend can
23 certainly be cured by repeating my
24 admonitions to the jury to the effect that
25 they are to decide this case based on the
26 evidence that they hear from the witness
27 stand and the law that I give them at the
28 close of the trial, and to remind them
29 that what the lawyers say is not evidence
30 in the case.

31 For those reasons, I find that there
32 has not been proof brought to this Court's

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1 attention in this hearing to suggest that
2 this jury cannot reach a fair and
3 impartial verdict in the case because of
4 the alleged irregularity by counsel during
5 the cross-examination of Dr. David
6 Townsend.

7 For those reasons, the defendants'
8 motion for a mistrial is hereby denied.

9 It's my understanding that the
10 witness, the live witness is due today at
11 1:30. Is that correct?

12 MR. WITTMANN:

13 That's correct, Your Honor.

14 THE COURT:

15 And that prior to that we will have
16 deposition testimony.

17 MR. WITTMANN:

18 Yes.

19 THE COURT:

20 And who will be called by depo?

21 MR. GAY:

22 Your Honor, Dr. Robin Kinser, which
23 is a read-in deposition, and Ms. Cheryl
24 Teamer from my office will do the
25 reading.

26 And then a witness by the name of
27 Fisher, which is a 12-minute video.

28 That may bring us to a conclusion,
29 depending upon when we start, a little bit
30 before noon.

31 We have a 45-minute deposition that
32 we were planning to play that would not

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1 seem to fit in to --

2 THE COURT:

3 Give me the names of the deponents
4 again?

5 MR. GAY:

6 Robin Kinser, K-i-n-s-e-r, Your
7 Honor, and Fisher.

8 MR. WILLIAMS:

9 Phil Fisher, Your Honor, who is a
10 former employee of B&W.

11 THE COURT:

12 Well, I'm looking at Mr. Copley's
13 letter of May 9 which says: Time
14 permitting, defendants expect to call the

15 following witnesses during the week of May
16 12, and Fisher is not on the list.

17 MR. WILLIAMS:

18 That letter was supplemented, Your
19 Honor, and I believe plaintiffs have a
20 copy of that supplemented --

21 MR. RUSS HERMAN:

22 Your Honor, we have no objection.

23 THE COURT:

24 I don't have that. Where is the
25 supplement?

26 MS. BERTAUT:

27 Judge, we delivered that supplement,
28 Your Honor, to you on Friday. My
29 apologies to the Court if you don't have
30 it.

31 MR. RUSS HERMAN:

32 I haven't gotten a supplement, Your
20534

1 Honor, but I do know that Mr. Gertler --
2 whatever problems there were with Fisher
3 were resolved.

4 I would like to have the supplement,
5 but plaintiffs aren't going to make any
6 objection.

7 THE COURT:

8 Mr. Gianna will meet with counsel in
9 regard to the objections to the
10 demonstratives planned to be used with
11 Dr. Blackie's testimony.

12 MR. RUSS HERMAN:

13 I want to correct the record. I was
14 out of town, but Regina says we did
15 receive a supplemental letter regarding
16 Mr. Fisher on Friday.

17 THE COURT:

18 If I have received it, I have not
19 seen it.

20 MR. SCHNEIDER:

21 Your Honor, I don't know whether Your
22 Honor has a copy of the expert report
23 package, but I thought you might want to
24 have that. There is a set of those.

25 MR. RUSS HERMAN:

26 The only thing we ask, Your Honor, so
27 there will be no interruption, we
28 understand that instead of the video of
29 Dr. Kinser, there is going to be an actual
30 reader, and that the reader be identified
31 with whatever law firm calls him so that
32 there is no misunderstanding by the jury

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1 that this isn't a witness.

2 THE COURT:

3 Has the answerer been agreed upon?

4 MR. RUSS HERMAN:

5 Mr. Gay says it's somebody from his
6 law firm.

7 MR. GAY:

8 No, problem. I will identify her.

9 MR. RUSS HERMAN:

10 We are not going to object. If he
11 has somebody from his law firm that wants

12 to read, that's fine. As long as they are
13 clearly identified as a member of the
14 firm.

15 THE COURT:

16 All right.

17 (In open court with a jury present at
18 11:00 a.m.):

19 THE COURT:

20 Please have a seat.

21 Before we begin this morning, ladies
22 and gentlemen of the jury, I want to
23 remind all of you again of the
24 instructions I gave you at the beginning
25 of the trial.

26 You are to decide this case based
27 upon the evidence you hear from this
28 witness chair and the exhibits that are
29 introduced into evidence and the law that
30 I give you at the close of trial, and
31 nothing else.

32 I told you then and I will tell you

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1 again, what the lawyers say is not
2 evidence, and if I sustain an objection to
3 a question, you are to disregard that
4 question and not try to decide or
5 speculate as to what the witness might
6 have said if allowed to answer that
7 question.

8 We will now present the testimony
9 of --

10 MR. GAY:

11 Robin Dale Kinser, Your Honor.

12 THE COURT:

13 -- who was deposed in this case.

14 And as I have told you in the past,
15 this is a method that the law allows for
16 the presentation of testimony of a witness
17 without the witness being physically
18 present.

19 And you are to take the testimony
20 that you are about to hear from Robin Dale
21 Kinser as though Dr. Kinser were present
22 and sitting in the witness chair.

23 And Mr. Gay, you will introduce the
24 answerer, please?

25 MR. GAY:

26 Yes, Your Honor.

27 Good morning, members of the jury.

28 This is one of my law partners,
29 Ms. Cheryl Teamer, who will be reading the
30 answers of Dr. Kinser from a deposition
31 that was taken in a case entitled Howard
32 A. Engle versus R. J. Reynolds Tobacco

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1 Company, et al., on July 1st, 1998; and
2 also from a case in which Dr. Kinser's
3 testimony was taken by deposition on
4 October 10, 1997, entitled Arch versus The
5 American Tobacco Company.

6 And that I believe are the two
7 depositions from which the designations
8 will be read.

9 MR. RUSS HERMAN:
10 If it please the Court, Steve Herman
11 handle any objections, if necessary, for
12 the plaintiffs.

13 MR. GAY:
14 And Your Honor, just so it's clear,
15 what I will be reading will be questions
16 to Dr. Kinser designated by both the
17 defendants and the plaintiffs.

18 I believe we start at page four.

19 -- -- --

20 ROBIN DALE KINSER
21 being previously duly sworn, testifies and says as
22 follows by deposition:

23 -- -- --

24 EXAMINATION

25 Q. Can you state your name for the
26 record, please?

27 A. My name is Robin Dale Kinser.

28 Q. Do you know why you have been
29 listed as a fact witness?

30 A. I was told that the company
31 listed me as a fact witness as a possible
32 response to another witness.

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1 Q. A response to what witness?

2 A. William Raymond Morgan.

3 Q. Do you know William Raymond
4 Morgan?

5 A. Yes, I do.

6 Q. And how do you know him?

7 A. I worked with him.

8 Q. What period of time did you
9 work with him?

10 A. We were both employees of R&D.
11 He was already employed when I joined the
12 company. We worked in the same group for
13 a few years, starting in the early '80s,
14 and I was his supervisor or his
15 supervisor's supervisor until he left the
16 company.

17 Q. What period of time would you
18 have been his supervisor or his
19 supervisor's supervisor?

20 A. From around 1985 through 1992.

21 Q. In other words, do you know
22 whether or not, if you took the alkaloids
23 out, the tobacco-specific nitrosamines
24 would still exist to the same extent in
25 tobacco smoke?

26 A. I don't know for sure.

27 Q. Has there been any research
28 about that, that you are aware of?

29 A. Yes, there has.

30 Q. And what research about that
31 are you aware of?

32 A. I'm aware of research where

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1 tobacco that is depleted in amines or in
2 the alkaloids is smoked and there is a
3 reduced level in the smoke relative to a
4 tobacco that's smoked that has a normal
5 level of alkaloids.

6 Q. Who did that research?
7 A. The project I ref -- smoke
8 condensate studies project did research on
9 that area.
10 Q. What specific individuals did
11 that research?
12 A. Steve Haut, Ray Morgan, Ernest
13 Lambert. I think a technician Ralph
14 Kaiser worked on that research. I don't
15 recall if I actually was involved in the
16 laboratory work on that research or not.
17 Q. Were you the supervisor of the
18 individuals who did that research at the
19 time they did the research?
20 A. Yes, I was.
21 Q. Who was your supervisor at that
22 time?
23 A. For part of that time, Ted
24 Sanders was my supervisor, and I believe
25 for part of that time, Kathy Ellis was my
26 supervisor.
27 Q. Did you inform your supervisor,
28 whoever it was at that time, of the
29 results of the research?
30 A. Yes, I did.
31 Q. Were the results of the
32 research put in written form?

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1 A. There were reports and
2 memoranda that described the research,
3 yes.
4 Q. Did anyone at any time,
5 including your supervisor, suggest to you
6 that the research be published in the
7 public domain?
8 A. I don't recall any such
9 suggestion.
10 Q. In your opinion, would it have
11 added anything to the knowledge base in
12 the public domain if the information had
13 been published at the time it was, at the
14 time the research was completed?
15 A. Yes.
16 Q. And what is the basis for that
17 opinion?
18 A. Our results shed some insight
19 regarding formation mechanisms.
20 Q. What was the research that --
21 what was the light it shed regarding
22 formation mechanisms?
23 A. The fact that there was a
24 reduction in the cigarette smoke when one
25 smoked a tobacco that had been depleted to
26 some degree in alkaloids.
27 Q. Do you recall whether anyone
28 who worked on the research made the
29 suggestion that it be published?
30 A. I don't recall any such
31 suggestion.
32 Q. If someone said that that

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1 suggestion was made, would you be of the
2 opinion that they were lying about it?

3 A. No, I would not be of the
4 opinion that they were lying about that.

5 Q. Did you ever work with someone
6 named Jan Jones?

7 A. Jan Jones and I were both
8 employed in R&D. We were not ever
9 assigned to the same project that I can
10 recall.

11 Q. And of course when you say R&D,
12 you mean research and development; right?

13 A. Yes, yes, I do.

14 Q. So you never supervised Jan
15 Jones?

16 A. No, I did not.

17 Q. Were the researchers instructed
18 not to use commercial cigarettes?

19 A. The experimental designs that
20 we put together required an ability to
21 control the components of the cigarette in
22 such a way that commercial cigarettes were
23 not desirable.

24 Q. Do you know whether any
25 researcher ever did, even one time, use a
26 commercial cigarette or commercial
27 cigarettes for any of this research?

28 A. I don't think of it as a
29 research study, but I remember being
30 provided commercial cigarettes and asked
31 to have them analyzed for their
32 nitrosamine content during the time that I

20542

1 was section leader.

2 Q. What specific commercial
3 cigarette or cigarettes did he ask you to
4 do this with?

5 A. I don't remember the full set
6 now, but they included the cigarettes that
7 had the reduced alkaloid tobacco from our
8 ART project, the commercial terminology or
9 brand, excuse me, is the right word, was
10 Nic and/or De-Nic. There probably were
11 some controls in that set as well, but I
12 don't remember specifically what all the
13 cigarettes were.

14 Q. The ones you are certain of are
15 those that were the denicotinized
16 cigarettes; is that correct?

17 A. Yes. Again, I don't look at
18 this as a research project. We were just
19 asked to analyze these cigarettes. They
20 included denicotinized cigarettes. I
21 think that the term is fine.

22 And there may have been some normal
23 controls. I don't recall at this point
24 what we used as a control and what the
25 full set of cigarettes I was presented
26 were.

27 Q. Do you know whether the
28 Virginia Slims cigarette was ever, at any
29 time, tested?

30 A. I don't know of Virginia Slims
31 being tested for nitrosamine content.

32 MR. GAY:

1 I think we missed a question, so let
2 me go back. Going back to line 13.

3 Q. Well, at any time. I'm talking
4 about the time frame between 1985 and
5 1993, during the time that you worked on
6 the project that was primarily related to
7 tobacco-specific nitrosamines in Richmond
8 Virginia?

9 A. I don't know of Virginia Slims
10 being tested for nitrosamine content.

11 Q. Do you know that it wasn't?

12 A. I don't have any recollection
13 of doing an evaluation of branded
14 cigarettes, branded commercial cigarettes,
15 other than the one that I just told you
16 about.

17 Q. Did William Ray Morgan ever
18 inform you that he had run a test on a
19 commercial cigarette and found that the
20 nitrosamine level was larger than the
21 nitrosamine level in the reference
22 cigarette?

23 A. No.

24 Q. Did William Ray Morgan ever run
25 any kind of test on a commercial
26 cigarette?

27 A. I have no knowledge that he
28 did.

29 Q. But you don't know one way or
30 the other whether he did or not; is that
31 correct?

32 A. I never had any reports from

1 him during the time I was his supervisor
2 about his running studies of branded
3 cigarettes.

4 Q. Was William Ray Morgan ever
5 told to destroy any research that he had
6 collected?

7 A. I never told him to destroy any
8 research data that he had collected.

9 Q. Do you know whether anyone ever
10 told him to destroy any research data he
11 had collected?

12 A. I have no knowledge of anyone
13 ever telling him to destroy any research
14 data.

15 Q. Did you ever have any
16 discussions with Kathy Ellis regarding any
17 research that was done by William Ray
18 Morgan?

19 A. Yes. I had many discussions
20 with Kathy about research that was done by
21 William Ray Morgan.

22 Q. Did you consider him to be a
23 good scientist?

24 A. Yes, I did.

25 Q. Did you ever evaluate his work?

26 A. Yes, I did.

27 Q. Did he receive evaluations from
28 you indicating that he was a good
29 scientist?

30 A. During those time frames when I
31 thought he was a good scientist, that's
32 what I put in his evaluation.

20545

1 Q. Was there any time frame where
2 you supervised him when you thought he was
3 not a good scientist?

4 A. There was a time frame when
5 there were some attendance issues and some
6 difficulties that I think had an impact on
7 his work, and those would have also been
8 reported in his performance appraisal.

9 Q. Now, you mentioned some period
10 of time when there were attendance
11 issues. What specifically are you
12 referring to when you say attendance
13 issues involving William Ray Morgan?

14 A. What I would call an unplanned
15 vacation time. Absences where we might
16 receive a call one morning that he
17 wouldn't be in that day.

18 Q. Did this happen all in one
19 general period of time or did it happen
20 over a period of years?

21 A. I remember that it worsened at
22 one point in time. I can't tell you
23 precisely what year that was.

24 Q. When you say worsened, what do
25 you mean?

26 A. More frequent, unplanned
27 absences.

28 Q. So when he was at work, as far
29 as you know, the quality of his work was
30 good; is that correct?

31 A. At this point in time, I think
32 the best answer I can give is that the

20546

1 quality of his work met the requirements
2 for his job.

3 Q. And during that period of time,
4 your recollection is he shared some
5 concerns he had with you about the prior
6 position he held prior to 1983 with
7 Philip Morris?

8 A. I have the recollection that he
9 had been unhappy. I also have a
10 recollection of getting that impression
11 from some of my management when he was
12 moved into our group, that this was viewed
13 as a better fit for him possibly.

14 Q. Which management gave you that
15 impression?

16 A. My manager at the time was Jim
17 Charles.

18 Q. Do you have any personal
19 knowledge that Ray Morgan ever received an
20 unsatisfactory evaluation, work
21 evaluation, while he worked at
22 Philip Morris?

23 A. No. I have no recollection of
24 that.

25 I want to mention again that between
26 1988 and the end of 1992, as a section

27 leader, there were other project leaders
28 who reported to me. So I was not directly
29 supervising Ray Morgan's work at that
30 time. I was the supervisor of his
31 supervisor.

32 Q. Who was directly supervising
20547

1 his work?

2 A. I'm pretty sure that was Al
3 Warfield.

4 Q. And during any of these
5 studies, was the smoke in the chamber aged
6 and measured, the nitrosamine level
7 measured as the smoke aged?

8 A. The chamber was used to study
9 aged sidestream smoke.

10 Q. And what, if anything, did the
11 research show regarding the level of NNK
12 nitrosamine as the smoke aged in the
13 chamber?

14 A. I don't recall that we did
15 studies in this chamber related to the
16 effect of aging on NNK.

17 Q. When you say you don't recall,
18 does that mean you might have, you just
19 don't remember right now?

20 A. It means I don't remember that
21 we did studies on the effect of aging on
22 NNK in this chamber.

23 Q. Well, did you find or did
24 anyone who did this research at
25 Philip Morris find that as the smoke aged,
26 the level of the nitrosamine level
27 increased?

28 A. You are asking me about
29 experiments conducted between 1988 and
30 1992; is that correct?

31 Q. Yes.

32 A. I don't remember that kind of
20548

1 study -- I don't know that that kind of
2 study was conducted in that time frame.

3 Q. Do you know of any research
4 done anywhere along that topic?

5 A. Yes.

6 Q. And what research are you aware
7 of and where was it done?

8 A. There were some studies
9 conducted at the Philip Morris R&D in
10 Europe.

11 Q. And when were the studies on
12 aged chamber smoke related to the
13 nitrosamine level done in Neuchatel in
14 Switzerland, as far as you know?

15 A. Early to mid '80s.

16 Q. And you don't know whether or
17 not that research was ever done in
18 Richmond; is that correct?

19 A. I don't have any recollection
20 of being involved in any planning or
21 hearing any results from research
22 regarding changes in NNK in aged
23 sidestream smoke.

24 Q. Was Roger Comes at any time in
25 charge of the chamber?
26 A. Yes, he was.
27 Q. Was he in charge of the chamber
28 in 1988-89?
29 A. To the best of my recollection,
30 yes, he was.
31 Q. Do you recall whether Roger
32 Comes ever told you, identified a Virginia
20549

1 Slims cigarette as a cigarette that had
2 been tested in the chamber?
3 A. I don't have a recollection of
4 having a discussion with Roger about his
5 testing Virginia Slims.
6 Q. You are not absolutely ruling
7 out the possibility that Roger Comes
8 mentioned a Virginia Slims being tested in
9 the chamber; is that correct?
10 A. I am not ruling out the
11 possibility that at some time Roger Comes
12 told me that they were looking at Virginia
13 Slims cigarettes in the chamber.
14 Q. Have you had any conversations
15 with any former or current employees of
16 Philip Morris, other than attorneys,
17 concerning the statements made by William
18 Ray Morgan regarding testing the Virginia
19 Slims cigarette?
20 A. Yes, I have.
21 Q. Who else have you discussed
22 this with?
23 A. With Kathy Ellis.
24 Q. Yes. When was the most recent
25 time you have talked with Kathy Ellis
26 about this?
27 A. Eighteen months ago or more.
28 Oh, wait, wait. Excuse me. Let me
29 think a minute. I'm sorry.
30 It would have been March, April of
31 1997. So I guess --
32 Q. What was the reason you talked
20550

1 to her in March or April of 1997 about the
2 statements that William Ray Morgan made?
3 A. Kathy was the person who let me
4 know about the statements he made in his
5 deposition.
6 Q. And it's your understanding
7 that he said that you had -- he had told
8 you about the tests he had done and you
9 ascertained from Robin -- from Roger
10 Comes, that it was a Virginia Slims
11 cigarette; correct?
12 A. That's what I understand he
13 alleged in his deposition.
14 Q. And that you then checked with
15 Kathy Ellis, and Kathy Ellis told you to
16 tell Ray Morgan to destroy the data that
17 he had collected; correct?
18 A. That's what I recall that he
19 said.
20 Q. So Kathy Ellis, as soon as she

21 became aware that Ray Morgan had made this
22 statement, contacted you to let you know
23 what Ray Morgan had said; is that correct?
24 A. I don't have any idea if it
25 was -- if she tried to contact me as soon
26 as she knew.
27 Q. But whenever, she contacted you
28 to let you know what Ray Morgan had said;
29 correct?
30 A. That's correct.
31 Q. What did you say after Kathy
32 Ellis conveyed this information to you?

20551

1 A. I don't remember my exact
2 words, but I conveyed that I didn't have
3 any idea what he was talking about.
4 Q. You are aware that there was a
5 study done in 1997 at the request of
6 Dr. Kathy Ellis concerning a measurement
7 of the NNK nitrosamine level of the aged
8 smoke of a Virginia Slims cigarette;
9 correct?
10 A. Yes.
11 Q. What was your involvement in
12 participating in planning the experiment?
13 A. I helped select the cigarettes
14 to be utilized in the study, and I
15 coordinated getting set up for the study
16 and the necessary rearrangement of other
17 experimental plans with the scientists at
18 PME R&D who conducted the experiment.
19 Q. What was the purpose of the
20 experiment?
21 A. As I would state it, the
22 purpose was to determine if there was such
23 a level as reported by Ray Morgan present
24 in aged sidestream from those
25 cigarettes -- reported by Ray in his
26 deposition.
27 I don't know the results from those
28 experiments.
29 Q. You've never seen the results?
30 A. I have not seen the results,
31 the final results.
32 Q. As a general matter, you were

20552

1 trying to identify and measure TSNA levels
2 in tobacco and cigarette smoke?
3 A. That was an activity.
4 Q. What other activities were you
5 doing related to nitrosamines?
6 A. We were trying to -- excuse
7 me. We were doing research on the origins
8 of the nitrosamines in cigarette smoke,
9 and we were trying to determine methods by
10 which the nitrosamine content of
11 mainstream cigarette smoke could be
12 reduced.
13 Q. Did you have an understanding
14 as to why Philip Morris was looking into
15 nitrosamines?
16 A. I knew that there were reports
17 in the referred literature that indicated

18 that there was a carcinogenicity or
19 tumorigenicity associated with
20 nitrosamines.
21 Q. Have you ever studied nicotine
22 as a chemical in any way?
23 A. Yes, I have.
24 Q. And how have you studied
25 nicotine?
26 A. I have conducted experiments to
27 evaluate the question of whether nicotine
28 is a precursor to mainstream NNK.
29 Q. NNK, all capped, which is an
30 abbreviation for a very, very long
31 chemical nitrosamine name.
32 Let's go back to the projects you

20553

1 described during the period '88 to '93.
2 Was Dr. Gullotta reporting to you?

3 A. Yes, he was.
4 Excuse me. I don't know if he
5 reported to me up through the end of '92.

6 Q. Project 1904, the study of
7 alterations to the tobacco plant, do you
8 remember mentioning that in the study?

9 A. Yes.

10 Q. What were the activities of
11 that study during that period?

12 A. That research was focused at
13 yielding a modified tobacco plant that
14 produced less nicotine.

15 Q. Was that genetically modified?

16 A. Yes.

17 Q. And the reason why you would
18 want to produce less nicotine is because
19 if you produce less nicotine, you are
20 producing less alkaloid; is that correct?

21 A. Nicotine is an alkaloid.

22 Q. And you were attempting to
23 produce less alkaloid?

24 A. We were attempting to produce
25 less nicotine.

26 Q. And you were attempting to do
27 that because nicotine is a precursor for
28 TSNA formation?

29 A. The focus of the 1904 work was
30 on reducing nicotine -- to reduce
31 nicotine. The question of nicotine as a
32 precursor for nitrosamines has different

20554

1 answers in the published referred
2 literature.

3 Q. Why were you trying to produce
4 less nicotine in the 1904 project?

5 A. There is a variety of compounds
6 that do link in some way.

7 The work that was being done in 1904
8 was focused on nicotine. If we were
9 successful with nicotine, that may have
10 suggested other endeavors we could follow
11 that could be more pertinent to other
12 classes of compounds.

13 There are also -- and this is my
14 personal recollection of what was going

15 on. This was in the context of other
16 endeavors by the company to have a
17 cigarette with reduced nicotine.
18 Q. Was this in conjunction with
19 the ART Project, cap A, cap R, cap T?
20 A. It was not in conjunction with
21 it. It was another method. The ART
22 Project was one way of approaching
23 alkaloid and/or nicotine production. This
24 was another way.
25 Q. Was this successful, the
26 attempt to modify the tobacco plant to
27 produce less nicotine --
28 MR. GAY:
29 Excuse me, I read that wrong.
30 Q. Was this successful, the
31 attempt to modify the tobacco plant to
32 produce less tobacco?

20555

1 A. From my perspective, the
2 experiments are still continuing. I can't
3 answer that question now.
4 Q. Is 1904 still a billing code?
5 A. No, it is not.
6 Q. What is it now?
7 A. We've changed that system. I
8 don't know how to answer that question.
9 Q. You don't have to. But the
10 project is still going on, this study of
11 altering the tobacco plant to produce less
12 nicotine?
13 A. Yes.
14 Q. Have there been any
15 preliminary --
16 A. Yes.
17 Q. -- results of that attempt to
18 do that?
19 And what have the preliminary results
20 showed?
21 A. We have seen some plants with
22 reduced nicotine levels.
23 Q. And this is -- is it fair to
24 call it genetic modification of the plant?
25 A. Yes, it is.
26 Q. Has any of the nicotine that
27 has been produced from these modified
28 tobacco plants ever been used in
29 commercial cigarettes?
30 A. No.
31 Q. When were you told that
32 Dr. DeNoble's lab was being closed?

20556

1 A. My recollection is a meeting in
2 A-1 Conference Room.
3 Q. Who attended that meeting?
4 A. The Biochemical Research
5 Division was invited, as I recall. I
6 don't know who attended.
7 Q. Who chaired the meeting?
8 A. Ted Sanders.
9 Q. Were you told why the lab was
10 being closed?
11 A. I don't remember hearing a

12 reason.
13 Q. Have you ever found out why the
14 lab was closed?
15 A. I don't remember that I've ever
16 heard an answer from someone I would think
17 knew the exact answer.
18 Q. You heard answers from people
19 that may know the exact answer -- or may
20 not know the exact answer?
21 A. I've heard speculation.
22 Q. What's the speculation that
23 you've heard?
24 A. That the company did not want
25 to be involved in the type of research
26 Dr. DeNoble was conducting for --
27 Q. The research being the study of
28 reinforcing properties of chemicals in
29 rats?
30 A. I don't remember the exact
31 subjects of Dr. DeNoble's studies.
32 Q. Dr. Kinser, does the types of

20557

1 filler that's used in the rod affect the
2 TSNA formation as far as your research was
3 concerned?
4 A. Yes, it does.
5 Q. In other words, the type of
6 tobacco that's in the rod in large measure
7 affects the formations of nitrosamines;
8 correct?
9 A. Yes.
10 Q. And therefore TSNA reductions
11 could be accomplished merely by the
12 selection of certain blends; is that
13 correct?
14 A. Yes. You could put together
15 blends and make -- there be differences in
16 the TSNA deliveries, yes.
17 Q. And make one TSNA delivery be
18 lower than another; correct?
19 A. Theoretically, yes.
20 Q. Has Philip Morris attempted to
21 blend cigarettes with TSNA deliveries in
22 mind?
23 A. I don't know the answer to
24 that. I'm not involved in blend
25 development decisions.
26 Q. Have you ever heard that
27 Philip Morris does select blends with TSNA
28 deliveries in mind?
29 A. I have never heard that.
30 Q. Have you ever heard that they
31 don't select blends with TSNA deliveries
32 in mind?

20558

1 A. I have never heard that.
2 Q. Dr. Kinser, are you aware of
3 any research studies being shredded at
4 Richmond R&D by anybody?
5 A. When we collect information and
6 enter it into notebooks or prepare
7 reports, we may go through a drafting
8 stage where tables have first been

9 written. And when we reach our final
10 report table, we may not keep all of the
11 information that was used to work up to
12 that.

13 And because we don't want our
14 competitors going through our trash, we do
15 not just wad things up and throw them in
16 the garbage. We shred them.

17 Q. Are you aware of any
18 supervisors instructing scientists at
19 Philip Morris to destroy research results
20 because they were perceived as being
21 unfavorable?

22 A. No, I am not.

23 Q. Have you ever done that?

24 A. No, I have not.

25 Q. Have you ever been a party to
26 someone else ordering someone to destroy
27 research results?

28 A. No, I have not.

29 Q. Has anyone ever told you to
30 instruct someone to destroy research
31 results?

32 A. No one has.

20559

1 Q. Are you aware of Philip Morris
2 trying to replicate a study that Dr. Ray
3 Morgan allegedly conducted in the 1980s
4 measuring aged sidestream smoke of a
5 commercial cigarette?

6 A. Yes, I am.

7 Q. Are you aware that that study
8 was done at FTR?

9 A. I call it PME, but, yes.

10 Q. PME? What was your involvement
11 in that study? That's really what I'm
12 getting to.

13 A. I coordinated the setup of that
14 study with the people who have
15 responsibilities for the experimental
16 apparatus and measurements at PME R&D and
17 help acquire the cigarettes that were
18 going to be used in that study.

19 Q. And were you able to duplicate
20 the experiment that Dr. Morgan has
21 testified that he performed?

22 A. I don't understand your
23 question when you ask if we were able to
24 duplicate the experiment.

25 Q. Okay. Why did you -- why was
26 this study conducted?

27 A. Dr. Ellis decided to have the
28 study conducted.

29 Q. What's your understanding of
30 why?

31 A. Inasmuch as I cannot speak for
32 her, it was in response to the allegations

20560

1 that Dr. Morgan made in his deposition.

2 Q. And do you know the results of
3 the study that was conducted?

4 A. I only know some preliminary
5 results.

6 Q. And what were the preliminary
7 results that you know?

8 A. The preliminary results that I
9 heard did not -- were not those reported
10 by Dr. Morgan in his deposition.

11 Q. He reported very high levels of
12 nitrosamine formations from aged
13 sidestream smoke?

14 A. That's what I recall, yes.

15 Q. And those are not the
16 preliminary results that you are aware of?

17 A. The preliminary results of
18 which I am aware did not indicate any
19 difference between the test cigarette and
20 the control cigarette.

21 MR. GAY:

22 That concludes Dr. Kinser's
23 testimony, Your Honor.

24 Thank you, Cheryl.

25 THE COURT:

26 The next deposition is that of whom?

27 MR. WILLIAMS:

28 Your Honor, the next deposition is of
29 Phil Fisher, who was a B&W employee from
30 1963 to 1991.

31 He was an agronomist, which is the
32 science of the study of soil management,
20561

1 and his position primarily was that of a
2 leaf blender at B&W during that period of
3 time.

4 THE COURT:

5 What form will that deposition take?

6 MR. WILLIAMS:

7 I forgot the most important thing,
8 excuse me. The most important thing:
9 It's less than fifteen minutes.

10 THE COURT:

11 And what form will the deposition
12 take?

13 MR. WILLIAMS:

14 It's a video, Your Honor.

15 -- -- --

16 PHIL FISHER

17 being previously duly sworn, testifies and says as
18 follows by videotaped deposition:

19 -- -- --

20 EXAMINATION

21 Q. Mr. Fisher, let me ask first,
22 where are you currently employed?

23 A. I'm retired and a farmer.

24 Q. Where are you retired from,
25 sir?

26 A. Brown & Williamson Tobacco
27 Corporation.

28 Q. When did you retire?

29 A. July the 1st, 1991.

30 Q. And how long did you work for
31 Brown & Williamson before you retired,
32 sir?

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1 A. Twenty-seven years.

2 Q. You remember your starting

3 date?
4 A. 1963, it was either June or
5 July.
6 Q. And you worked continuously for
7 Brown & Williamson from 1963 to 1991?
8 A. Correct.
9 Q. Can you state what your job
10 titles were while working for Brown &
11 Williamson over the years? I'm assuming
12 there weren't many changes, but you can
13 begin and we can talk about it as you go
14 along; okay, sir? Start in '63 and just
15 move forward.
16 A. Okay. I started in 1963 as an
17 agronomist.
18 And then I became section leader in
19 the Research Department, which included
20 agronomy and microbiology.
21 Then I became assistant leaf
22 blender.
23 Then I became leaf blender.
24 Then I became leaf blender and in
25 charge of green leaf processing.
26 Then I became -- I forget the exact
27 title, but basically it was all of the
28 agriculturate and leaf tobaccos.
29 Q. Was it still a blending type
30 job?
31 A. Oh, yes, absolutely.
32 Q. And that was your last job that
20563

1 you held?
2 A. That's right.
3 Q. So the jobs where your title
4 included leaf blending began in what year,
5 sir?
6 A. Approximately late '70s. I
7 don't remember the exact year.
8 Q. Okay.
9 A. Mid '70s, I would say.
10 Q. All right. You mentioned that
11 when you started you were an agronomist?
12 A. Correct.
13 Q. Explain exactly what that is?
14 A. Agronomists, for Brown &
15 Williamson, we would go into various
16 tobacco fields all over the country, look
17 at the quality of the leaf; report back to
18 the leaf buyers where the tobaccos were
19 that had the most promise; did reports on
20 them, on the different areas, both flue-
21 cured and Burley, and compiled reports on
22 them, on the quality of the leaf before
23 the markets opened; and then visited the
24 tobacco markets as the sales season
25 started.
26 Q. All right. Now, how did that
27 change when you became a leaf blender?
28 What was your job, if you could describe
29 it, as a leaf blender?
30 A. Leaf blender, my job primarily
31 was to maintain existing blends.
32 Q. And when you talk about blends,

1 are you talking about for purposes of
2 cigarettes?

3 A. Yes.

4 Q. Brown & Williamson cigarettes?

5 A. Brown & Williamson cigarettes.

6 Q. All right, sir.

7 A. But it also included pipe
8 tobaccos and other products.

9 Q. Any Brown & Williamson Tobacco
10 product?

11 A. That's correct.

12 Q. All right, sir. Did your job
13 at any time include responsibility for the
14 design of the filter of cigarettes?

15 A. No.

16 Q. Did your job, sir, at any time
17 entail responsibility for the cigarette
18 paper?

19 A. No.

20 Q. Did your job at any time, sir,
21 entail responsibility for smoking
22 behavior?

23 A. I don't understand what you
24 mean by smoking behavior.

25 Q. With reference to how people
26 smoke a cigarette and what happens when
27 people smoke cigarettes?

28 A. Are you referring to research
29 on how people smoke cigarettes?

30 Q. That would be one area.

31 A. No, I did not. No.

32 Q. Can you think of any area that

1 may touch on that, sir, smoking behavior?

2 A. From a leaf blending
3 standpoint, I had to teach people to smoke
4 cigarettes.

5 Q. Okay. How did that work?

6 A. Well, in teaching leaf
7 blending, you have several different
8 components of a blend. You have to smoke
9 individual components of the blend and
10 recognize the physical and chemical
11 characteristics, and by visual.

12 And then you smoke it, and you fix
13 that in your mind. And over the years and
14 years of experience, you become so that
15 you can look at tobacco and tell how it
16 smokes.

17 Q. So was this an expertise that
18 you developed specifically over the years?

19 A. Oh, it was expertise that was
20 taught to me, and then everyone develops
21 it over years. You don't just go to
22 school to be a leaf blender. It's years
23 of experience.

24 Q. It's primarily based on
25 experience?

26 A. Yes.

27 Q. Were there others who worked as
28 leaf blenders at the same time you did for
29 Brown & Williamson?

30 A. Yes.
31 Q. Approximately how many other
32 people let's say in the 1970s were working
20566
1 as leaf blenders? Is that a fair
2 question?
3 A. I'd say approximately four, and
4 it's a guess.
5 Q. Did that change in the 1980s?
6 A. Yes, probably went up to five
7 or six.
8 Q. And how about the 1990s?
9 A. I retired in '91, so --
10 Q. That's true, 1991. So for that
11 couple of years?
12 A. I think we had about five when
13 I left. Now, that's an estimate.
14 Q. Were you the supervisor or --
15 A. Yes.
16 Q. Okay. So these other four or
17 five people worked under you?
18 A. Correct.
19 Q. Was that true throughout the
20 '70s, the '80s, and until you retired?
21 A. The '80s it was true, but I
22 worked under leaf blenders in the late
23 '70s.
24 Q. All right. Before you get to
25 that, I thought I heard you mention when
26 you were talking something about
27 microorganisms?
28 A. I said I was in charge of the
29 microbiology department.
30 Q. Did that have anything to do
31 with the farming of tobacco plants?
32 A. No.

20567

1 Q. Did that have anything to do
2 with microorganisms being used in any way
3 with reference to tobacco?
4 A. We have several patents which
5 are readily available using
6 microorganisms.
7 Q. But were you, sir, directly
8 involved in that process --
9 A. Yes.
10 Q. -- using microorganisms?
11 A. Yes.
12 Q. Yes?
13 A. Yes.
14 Q. When was that, estimate?
15 A. Huh?
16 Q. An estimate.
17 A. In '67 to '91.
18 Q. And what was that process
19 intended to do, the use of the
20 microorganisms?
21 A. Well, the microbiology
22 department's main concern was that this is
23 a commodity that people put in their
24 mouth, and we were concerned with plant
25 hygiene, with supplier's hygiene, products
26 being hygienically acceptable, and that

27 was the biggest job or biggest part of the
28 microbiology function.
29 Q. Was there anything with
30 reference to the use of microorganisms
31 that would affect the nicotine in the
32 plant?

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1 A. Not the nicotine in the plant,
2 but the nicotine of the finished product.
3 The patents, as I recall, were on the
4 nitrate reduction, reduction of nitrate in
5 a wet solution, not on the leaf itself --

6 Q. I see.

7 A. -- but in some of the
8 by-products.

9 Q. And the intended effect would
10 be to reduce the nitrates in the plant?

11 A. Yes -- no, no.

12 Q. I mean, excuse me, in the
13 finished product?

14 A. In the finished product.

15 Q. And you actually saw that
16 process being used?

17 A. We never adopted it
18 commercially, but like I say, we have a
19 patent on it.

20 Q. I see. But did you ever see
21 the process being experimented with?

22 A. Oh, yes. I experimented with
23 it myself.

24 Q. What years are we talking
25 about?

26 A. Late '70s. That's the best I
27 can do on these dates.

28 Q. That's okay. And do you know
29 one way or the other whether the process
30 worked insofar as it reduced the nitrates?

31 A. Yes, it did work.

32 Q. And do you know why it was

20569

1 never used in the commercial product?

2 A. Yeah, because it smoked like
3 hell.

4 Q. It didn't taste good?

5 A. It didn't taste as good.

6 Q. I see. It didn't taste as good
7 as what?

8 A. As a product without it.

9 Q. Were you one who was asked to
10 judge the taste of the product?

11 A. I was one of many, yes.

12 Q. Of many?

13 A. Yes.

14 Q. Do you know whether in fact it
15 was smoke panels that were set up to judge
16 the taste of that product?

17 A. I can't say with 100 percent,
18 but I'm 95 percent that we used internal
19 panels to screen it because we did that on
20 all of our experiments.

21 Q. Do you know, if I wanted to
22 talk to the person responsible for having
23 supervised the judgment of the taste of

24 this tobacco that had been treated with
25 the microorganisms, who would that have
26 been?
27 A. You'd have to go to Brown &
28 Williamson and ask that question.
29 Q. You don't know offhand?
30 A. I don't know, and I don't know
31 whether he's alive, retired or whoever it
32 might be.

20570

1 Q. Okay. Is it fair to say that
2 it wasn't your job to specifically employ
3 panels to judge the taste?
4 A. I was not a panel organizer.
5 Or I was a panel expert, but not an
6 organizer or one that --
7 Q. All right, sir.
8 A. -- managed the panel
9 development.
10 Q. Are you involved in the buying
11 of the tobacco for Brown & Williamson?
12 A. I was not a buyer of tobacco.
13 My job was to advise the buyers of what we
14 wanted to put in the cigarettes.
15 Q. I've got you. And with
16 reference to that advice, did it -- did it
17 have -- did you have in mind in terms of
18 that advice the specific nicotine content
19 that you were trying to accomplish for
20 these tobacco products?
21 A. Well, you keep saying specific
22 nicotine and specific nicotine.
23 Q. Yes, sir.
24 A. And nicotine was only one of
25 the minor components. What we looked at
26 most was the smoking quality of that
27 tobacco, of which nicotine is a small
28 component.
29 The burnability of it, you can have
30 something that has a 2 percent nicotine
31 and it would smoke absolutely terrible if
32 the other leaf characteristics are not

20571

1 good.
2 Q. All right. Mr. Fisher, have
3 you ever heard of the term nicotine
4 fortification?
5 A. Certainly.
6 Q. In what context, sir?
7 A. When the news media accused
8 certain tobacco companies of fortifying
9 cigarettes -- or fortifying tobacco with
10 nicotine.
11 Q. Let me ask the question with
12 reference to the reconstituted tobacco.
13 A. Yes.
14 Q. Are you aware of whether there
15 was ever any nicotine fortification in
16 recon?
17 A. During my 27 years at Brown &
18 Williamson --
19 Q. Yes, sir.
20 A. -- there was never any nicotine

21 fortification of reconstituted tobacco.
22 Q. So during your entire
23 employment, there was never any nicotine
24 that was added to the recon; is that
25 correct?
26 A. There was no nicotine added to
27 any product in any shape or form.
28 (End of video.)
29 MR. WILLIAMS:
30 That completes the deposition, Your
31 Honor, and ladies and gentlemen.
32 THE COURT:

20572

1 All right. We will recess for lunch
2 until 1:30 by the wall clock.
3 (In open court without a jury
4 present:)
5 THE COURT:
6 Let the record reflect that the
7 jurors left the courtroom.
8 Anything for the record by plaintiffs
9 counsel?
10 MR. RUSS HERMAN:
11 No, Your Honor.
12 I do have one question, and that is I
13 don't have an amendment to the list of
14 what depositions are going to be played for the
15 remainder of the week.
16 THE COURT:
17 Nor do I, Mr. Herman.
18 MR. SCHNEIDER:
19 That was the only thing.
20 MR. RUSS HERMAN:
21 Was that the only change?
22 MR. WILLIAMS:
23 That was the only one.
24 MR. RUSS HERMAN:
25 Thank you.
26 THE COURT:
27 Defense counsel, anything for the
28 record?
29 MR. WITTMANN:
30 No Your Honor.
31 THE COURT:
32 All right. Mr. Gianna wants to meet

20573

1 with counsel at 1:00 with regard to
2 Dr. Burns -- Blackie.
3 THE COURT:
4 Excuse me, Dr. Blackie at 1:00 p.m.
5 We will recess at this point.
6 (Whereupon, the hearing adjourns at
7 11:45 a.m.)
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1 REPORTER'S CERTIFICATE

2

3 I, NICHOLAS A. MARRONE, CCR, Registered
4 Merit Reporter, do hereby certify that the foregoing
5 proceedings were reported by me in shorthand and
6 transcribed under my personal direction and
7 supervision, and is a true and correct transcript,
8 to the best of my ability and understanding.

9 That I am not of counsel, not related to
10 counsel or the parties hereto, and not in any way
11 interested in the outcome of this matter.

12

13

NICHOLAS A. MARRONE (CCR 21011)
CERTIFIED COURT REPORTER
REGISTERED MERIT REPORTER

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